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By Hand Delivery

Jeff S. Jordan, Esq.
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Federal Election Commission
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Washington, D.C. 20463

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OFFICE OF GENERAL
COUNSEL

Re: MUR 6502

Dear Mr. Jordan:

On behalf of Respondents Nelson 2012 and Susan Landow, Treasurer, we write in response to the complaint in MUR 6502.

The complaint revolves around issue advertisements sponsored by the Nebraska Democratic Party and featuring Senator Ben Nelson, the state's senior Democrat. The ads focused on the national budget debate and aired more than a year before the Senator's general election. Solely because he appeared in the ads, and because his campaign sent two Tweets on these same broad issues, the Nebraska Republican Party fabricates a claim of coordination that is based on republication of campaign materials. There is no merit to the complaint, and the Commission should immediately dismiss it.

STATEMENT OF FACTS

Ben Nelson is Nebraska's senior United States Senator. He is Nebraska's highest-ranking Democrat. He sits on the Senate Appropriations Committee and is a leading voice on budget issues. For the last two decades, he has held state-wide elected office, serving first as Governor and then as United States Senator. As the only Democratic member of Nebraska's Congressional delegation, he is the face of the Nebraska Democratic Party on federal issues,

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especially those involving the budget and entitlements. The Nebraska Democratic State Central Committee ("NDSCC") is the Nebraska Democratic Party's state party committee under Commission rules.

From July 20, 2011 through the time of the complaint's filing, the NDSCC ran a series of advertisements ("the advertisements") designed to inform Nebraskans about issues before Congress. These advertisements coincided with an historic debate about whether to cut entitlement programs like Social Security and Medicare and how to lower the national debt; Senator Nelson's own general election for Senate was more than a year away. The advertisements warned Nebraskans about proposals to cut entitlements and urged Nebraskans to take action by signing a petition to protect those programs. They also urged Nebraskans that Senator Nelson, the state's sole Democrat in Congress, would fight for a responsible fiscal policy that would protect Medicare and Social Security.

The ads were sponsored by the NDSCC. Senator Nelson appeared in them and delivered their message. He was the natural choice for this role, given his status as the highest ranking Democrat in the State and the only Nebraska Democrat directly involved in the federal debate. The ads were neither contributions nor coordinated expenditures in support of the Senator's campaign. But because Senator Nelson had filed a Statement of Candidacy in connection with the 2012 general election, and was hence a "candidate" under Commission rules, the ad complied with the Commission's sponsorship identification requirements, saying that he approved the ad through verbal and written statements.¹

The NDSCC paid for the advertisements in their entirety. It hired media consultants to draft the scripts, shoot the footage, edit the advertisements, and place them with television stations. Through this process, the NDSCC created all video and audio content that would eventually air in the advertisements. It did not use any previously existing pictures or audio clips, and did not borrow any content from Senator Nelson's campaign.

The Nebraska Republican Party now argues that these are coordinated party communications because they "disseminate, distribute, or republish . . . campaign materials" prepared by Nelson 2012. The sole factual basis for this claim are that he appeared in the ads, and that his campaign sent two "Tweets" – text-based posts of less than 140 characters – on the same budget issues as those discussed in the ads. From this, the complaint tries to argue that the "content" prong for the coordination test is met, and that the advertisements count as contributions to Senator Nelson's 2012 reelection campaign. But this argument is without merit, and lacks any support in law. The Commission should dismiss the complaint.

¹ See MUR 6037 (Merkley).

ARGUMENT

To be coordinated, a party-sponsored ad must meet payment, conduct, and content prongs – only the last of which is at issue here. To meet the content prong, a state party communication must either: (1) disseminate, distribute, or republish campaign materials, (2) contain express advocacy,² or (3) refer to the candidate, or another candidate for the same office, within 90 days of his election, while being distributed in the jurisdiction in which he is running. The complaint does not allege express advocacy or direct reference within 90 days of an election.³ It is premised wholly on republication of campaign materials.

The complaint appears to offer two alternative theories of republication: (1) that Senator Nelson appeared in the ad to camera, and hence that the ad somehow became his "campaign materials" by virtue of his appearance; and (2) that Senator Nelson's campaign had previously sent two "Tweets" using phrases similar to those in the ads. But neither theory is supported by Commission rules.

A. Senator Nelson's Appearance in an NDSCC Advertisement Does Not Convert the Advertisement into a Republication of His Campaign Materials

Under Commission rules, republication is triggered when a third party uses pre-existing graphic, video, or audio materials. For example, in MUR 5672 (2006) (Save American Jobs Association), the Commission found republication where a third party distributed a promotional video that had been produced by a candidate's previous campaign.

But republication does occur when a third party creates graphic, video, or audio materials anew. In MUR 6044, (Musgrove), for example, the Commission held that republication did not exist when the Democratic Senatorial Campaign Committee ("DSCC") created a new advertisement in which the candidate appeared. In that matter, the Commission stressed that the party produced

² The party coordination rules differ in one significant respect from those governing ads by non-party groups. The "functional equivalent of express advocacy" can meet the content prong under the non-party rules. See 11 C.F.R. § 109.21(c)(5). But actual express advocacy is required under the party rules, unless the ad republishes campaign materials, or is distributed inside the 90-day window. See *id.* § 109.37(a)(2)(ii).

³ Complainants do not make these allegations because they cannot. The advertisements aired long before the start of the 90-day window preceding the May 15, 2012 Nebraska U.S. Senate primary. Additionally, the advertisements did not meet the standard for express advocacy. They used no phrases to urge election or defeat, such as "vote for," "vote against," "elect," or "defeat." Second, they could be reasonably – and readily – understood as seeking to inform Nebraskans about important decisions that were being made in Washington, D.C., and to motivate them to support a particular position on those issues.

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and disseminated *its own* material, rather than distributing materials produced by the campaign, and this did not constitute republication.⁴

In MUR 6037 (2008) (Merkley), there was again no finding of republication, even when the candidate himself appeared in a state party ad, and even when there were some similarities between his own campaign materials and language in the state party ad.⁵ In Advisory Opinion 2006-29, the Commission advised that a tourism agency would not republish Congresswoman Bono's campaign materials by asking her to appear in an infomercial. The outcome of these matters is simply common sense: something cannot be republished until it has been published in the first place.

Here, the NDSCC created the advertisements, hiring consultants to draft the script and shoot and edit the footage. The complainant does not – and cannot – allege that the NDSCC used any previously existing graphic, video, or audio materials produced by Nelson 2012 or any prior Nelson campaigns. Senator Nelson's appearance in the advertisements tracks well-settled Commission precedent, and does not constitute republication.

B. The NDSCC Advertisements Did Not Republish the Nelson Campaign's Tweets

The complaint also argues that the advertisements republish campaign materials because they use the phrase "on the backs of seniors," a phrase which Senator Nelson's campaign previously tweeted on two occasions. In making this claim, they argue that the phrase "on the backs of seniors" constitutes Senator Nelson's campaign material.

Such a claim of republication might qualify as innovative, had the Commission not declined to embrace it before. In MUR 6037 (2008) (Merkley), discussed above, Senator Merkley appeared in a Democratic Party of Oregon advertisement and stated that we should give our troops "the respect they deserve." The complainant in that case argued that the advertisement republished Senator Merkley's campaign materials, because his candidate committee had previously issued a press release using the same "respect they deserve" phrase. But the General Counsel concluded that the overlap in such a short, common quotation was not sufficient to satisfy the republication requirement.⁶

⁴ See Statement of Reasons, MUR 6044, at 4 ("Respondents argue that they did not republish campaign material because the advertisement consisted of all new script and footage created by the DSCC. . . . Because the material at issue in this matter was produced and disseminated by the DSCC, the DSCC did not republish the campaign material").

⁵ See MUR 6037, First General Counsel's Report, at 11-12.

⁶ See *id.*

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The phrase "on the backs of seniors" does not belong to the Nelson campaign, just as the phrase "respect they deserve" did not belong to Senator Merkley. Both are short, common phrases that elected officials commonly use. In the month of July, 2011 alone, House and Senate members used the phrase "on the backs of seniors" on the floor of their respective chambers on twenty-three occasions.⁷

CONCLUSION

For the foregoing reasons, the advertisements did not republish Senator Nelson's campaign materials, and MUR 6502 should be dismissed.

Very truly yours,



Brian G. Svoboda
Lauren E. Tribble

⁷ See, e.g. 157 Cong. Rec. S4814 (daily ed. July 22, 2011) (statement of Senator Reid); 157 Cong. Rec. H5251 (daily ed. July 20, 2011) (statement of Congresswoman Schakowsky); 157 Cong. Rec. H5676 (daily ed. July 28, 2011) (statement of Congressman Baca); 157 Cong. Rec. H5502 (daily ed. July 26, 2011) (statement of Congresswoman Pingree).